

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

PAUL COSTANZO,

Plaintiff,

vs.

CITY OF OMAHA, DONALD CAREY,  
ALAN PEPIN, MARTIN CONBOY, and  
BRIDGET HOWELL,

Defendants.

Case No. 8:04CV99

**ORDER ON  
PRETRIAL CONFERENCE**

A final pretrial conference was held on the 10th day of June, 2005. Appearing for the parties as counsel were David L. Nich, Jr. for the Plaintiff and Thomas O. Mumgaard for the Defendants.

(A) EXHIBITS IN EVIDENCE. The following exhibits are received in evidence without objection and no formal offer need be made of them: See attached lists.

(B) UNCONTROVERTED FACTS. The parties have agreed that the following may be accepted as established facts for purposes of this case only:

1. This action is brought pursuant to 42 U.S.C. §§ 1983 and Nebraska Revised Statute §20-148. The Court has jurisdiction over the subject matter and venue is proper.
2. At all times relevant to this case, Paul Costanzo was a resident of Omaha, Nebraska.
3. The City of Omaha is a political subdivision of the State of Nebraska and operates the Omaha Police Department and the Prosecution Division of the Omaha Law Department.
4. At all times relevant to this case, Donald Carey and Alan Pepin were sworn police officers of and employees of the City of Omaha and Donald Carey was the Chief of the Police

*TM*  
*DM*

Department. At all times relevant to this case, Bridget Howell was a non-sworn employee of the Omaha Police Department.

5. At all times relevant to this case, Martin Conboy was an employee of the City of Omaha, serving as the City of Omaha Prosecutor and supervising the activities of the Omaha Law Department, Prosecution Division.

6. At all times relevant to this case, Donald Carey, Alan Pepin, Bridget Howell, and Martin Conboy acted under color of law.

7. On August 29, 2001, Ms. Julie Erhart, Mark Macke, and Andrea Macke reported to Omaha police officers that several confrontations had occurred between them and members of the Paul Costanzo family in or about these persons' yards. The police officers documented this claim in a police report that was available for review by the Omaha City Prosecutor.

8. On August 29, 2001, Ms. Julie Erhart reported to an Omaha police officer that Paul Costanzo had verbally threatened her. The police officer documented this claim in a police report that was available for review by the Omaha City Prosecutor.

9. On September 16, 2001, Paul Costanzo's daughter reported to an Omaha police officer that a confrontation between her and Andrea Macke had occurred in or about these persons' yard. The police officer documented this claim in a police report that was available for review by the Omaha City Prosecutor.

10. On September 24, 2001, Ms. Julie Erhart submitted to the Omaha Prosecutor's office an affidavit describing an encounter she'd had with Paul Costanzo. Ms. Erhart signed the affidavit under oath. On that date she signed a "Prosecuting Attorney's Complaint Agreement" asking the Omaha City Prosecutor to prosecute Paul Costanzo on account of the encounter. That Agreement further stated that she agreed that the allegations were of a serious nature, that the allegations were

true, that she would appear and testify in support of the allegations at any court proceedings if asked to do so, and that only the City Prosecutor or his staff had the power to dismiss those charges. On October 15, 2001, Ms. Erhart signed under oath a Complaint and Information charging Paul Costanzo with the crime of Disorderly Conduct. These charges were subsequently amended to charge Disturbing the Peace. The Complaint and Information was reviewed and approved by an attorney under the supervision of Martin Conboy and filed with the court by that attorney. On October 16, 2001, a Judge of the County Court of Douglas County signed a warrant for the arrest of Paul Costanzo based on the Complaint and Information signed by Ms. Erhart. On December 7, 2001, a Judge of the County Court of Douglas County found Paul Costanzo guilty of Disturbing the Peace, as alleged by that Complaint and Information.

11. On September 25, 2001, Mr. Mark Macke reported to an Omaha police officer that a member of Paul Costanzo's family was suspected of making harassing telephone calls to Mr. Macke's place of employment. The police officer documented this claim in a police report that was available for review by the Omaha City Prosecutor.

12. On September 25, 2001, Paul Costanzo's daughter reported to an Omaha police officer that a confrontation had occurred between her and Mark Macke in or about these person's yards. The police officer documented this claim in a police report that was available for review by the Omaha City Prosecutor.

13. On May 1, 2002, Ms. Andrea Macke reported to an Omaha police officer that Paul Costanzo's wife verbally threatened her. The police officer documented this claim in a police report that was available for review by the Omaha City Prosecutor.

14. On May 11, 2002, Ms. Andrea Macke reported to an Omaha police officer that Paul Costanzo's wife had physically assaulted her. The police officer documented this claim in a police report that was available for review by the Omaha City Prosecutor.

15. On May 13, 2002, Paul Costanzo's wife reported to an Omaha police officer that a confrontation had occurred between her and Andrea Macke in or about these persons' yards. The police officer documented this claim in a police report that was available for review by the Omaha City Prosecutor.

16. On August 23, 2002, Ms. Theresa Jones reported to an Omaha police officer that a confrontation had occurred between her and Paul Costanzo and his wife. The police officer documented this claim in a police report that was available for review by the Omaha City Prosecutor.

17. On November 6, 2002, Ms. Andrea Macke and Paul Costanzo's wife reported to Omaha police officers that a verbal confrontation between Mark Macke and Paul Costanzo had occurred in or about these persons' yard. The police officer documented these claims in police reports that were available for review by the Omaha City Prosecutor.

18. On March 23, 2003, Ms. Andrea Macke reported to an Omaha police officer that a confrontation between her and Paul Costanzo had occurred in or about these persons' yard. The police officer documented this claim in a police report that was available for review by the Omaha City Prosecutor.

19. On March 27, 2003, Ms. Julie Erhart, Ms. Andrea Macke, and Ms. Theresa Jones submitted to the Omaha Prosecutor's office individual affidavits describing several encounters they'd had with Paul Costanzo. They signed the affidavits under oath. On March 27, 2003, Ms. Erhart, Ms. Macke, and Ms. Jones signed under oath individual Complaint and Information documents charging Paul Costanzo with the crime of Stalking. The Complaint and Information was reviewed and

approved by an attorney under the supervision of Martin Conboy and filed with the court by that attorney. On March 31, 2003, a Judge of the County Court of Douglas County signed a warrant for the arrest of Paul Costanzo based on the Complaint and Information documents. On September 29, 2003, the charges were dismissed on the motion of the Omaha City Prosecutor.

20. At all times relevant to this case, the Omaha Police Department had an established policy authorizing officers to advise citizens that they could use the misdemeanor warrant procedure to seek a legal remedy when they believed a crime had been committed against them. That procedure required the citizen to go to the City Prosecutor's office and, through a sworn affidavit, provide the Prosecutor or his legal staff with sufficient information to establish probable cause for an arrest. The Police Department policy understood that the decision to seek a warrant for anyone's arrest would be up to the City Prosecutor and the decision to issue a warrant would be up to a judge.

21. At all times relevant to this case, the Omaha City Prosecutor had an established policy authorizing citizens to use the misdemeanor warrant procedure to seek a legal remedy when they believed a crime had been committed against them. That procedure required the citizen to go to the City Prosecutor's office and, through a sworn affidavit, through reports of police officers, and through other available reliable information, provide the Prosecutor or his legal staff with sufficient information to establish probable cause to believe a crime had been committed and that the named person had committed it. The City Prosecutor or his legal staff retained the sole authority to decide whether or not to seek a warrant for anyone's arrest and the decision to issue a warrant for arrest was solely up to a judge.

(C) CONTROVERTED AND UNRESOLVED ISSUES. The issues remaining to be determined and unresolved matters for the court's attention are:

1. Whether the arrest of Paul Costanzo in 2001 and 2003 pursuant to arrest warrants issued on sworn affidavits of citizens deprived Paul Costanzo of his constitutional rights not to be arrested without probable cause as protected by the 4<sup>th</sup> and 14th Amendments to the United States Constitution.

2. If Paul Costanzo was deprived of his constitutional rights in this manner, whether the deprivation was a proximate result of a policy or established practice of the City of Omaha.

3. If Paul Costanzo was deprived of his constitutional rights in this manner, whether the deprivation was a proximate result of an act by Donald Carey, Alan Pepin, Martin Conboy, and/or Bridgett Howell.

4. If Paul Costanzo was deprived of his constitutional rights in this manner, the damages, if any, proximately caused by the deprivation; specifically:

- a) General damages for the loss of a constitutional right;
- b) Special damages in the amount of \$\_\_\_\_\_ incurred as lost wages, future earnings, moving costs, fees, and fines.

DEFENDANT OBJECTS TO THIS LISTING OF SPECIAL DAMAGES AS INCLUDING ITEMS NEVER DISCLOSED AS REQUIRED BY FED. RULE CIVIL PROC. 26(a)(1)(C) AND SCHEDULING ORDERS ENTERED BY THIS COURT. *issue strike for nondisclosure, without prejudice.*

5. If Paul Costanzo was deprived of his constitutional rights in this manner, whether Plaintiff is entitled to recover attorney fees, and the amount thereof, pursuant to 42 U.S.C. § 1988.

6. Whether Defendant Martin Conboy is entitled to prosecutorial immunity for the decisions to institute criminal charges against Paul Costanzo in October, 2001, and/or March, 2003.

7. Whether Nebraska Revised Statute § 20-148 (Reiss. 1997) provides a basis for recovery by Plaintiff.

(D) WITNESSES. All witnesses, including rebuttal witnesses, whom the plaintiff expects to call to testify, except those who may be called for impeachment purposes as defined in NELR 16.1(c) only, are: [ALL WITNESSES RESIDE IN OMAHA UNLESS OTHERWISE NOTED]

WITNESS NAME	ADDRESS OR OTHER IDENTIFIER	WILL CALL	MAY CALL
Paul Costanzo	Plaintiff	X	
Bridget Howell	Defendant		X
Marty Conboy	Defendant		X
Donald Carey	Defendant, resident of Melbourne, Florida		X
Alan Pepin	Defendant, resident of Anchorage, Alaska		X
*Wanda Costanzo	Plaintiff's wife		X
*Tami Costanzo	Plaintiff's daughter		X
*Tristin Bonn	City of Omaha Public Safety Auditor		X
*L. Steven Grasz	Blackwell & Sanders, Attorneys At Law, 13710 FNB Parkway		X
*Mike Fahey	City of Omaha Mayor		X
*Paul Landow	City of Omaha Mayor's Chief of Staff		X
*Chris Liecke	City of Omaha Police Officer		X
*William Erhart	9225 Spaulding Street		X
*Mary Beth Erhart	9225 Spaulding Street		X
*Edward C. Birkel	1220 State Capitol, Lincoln, NE.		X
*Deborah A. Carey-Minardi	8303 Spring Plaza		X
*Robert S. Blanchard	8303 Spring Plaza		X
*Angela Carlson	8303 Spring Plaza		X
*John Doe (True identity unknown)	Douglas County Sheriff's Office		X
Omaha Public Schools Director			X
South High School Principal			X
Any person listed by Defendants, below			X

\* DEFENDANTS OBJECT TO CALLING THIS WITNESS AS THE WITNESS WAS NOT DISCLOSED AS REQUIRED BY FED. RULE CIVIL PROC. 26(a)(1)(A) AND SCHEDULING ORDERS ENTERED BY THIS COURT.

*Wanda and Tami Costanzo for damages only - otherwise Defendants Objects are sustained for non-disclosure.*

All witnesses whom the defendant expects to call to testify, except those listed in the preceding paragraph as expected to be called by the plaintiff and except those who may be called for impeachment purposes only, are:

WITNESS NAME	ADDRESS OR OTHER IDENTIFIER	WILL CALL	MAY CALL
Bridget Howell	Defendant	X	
Marty Conboy	Defendant	X	
Andrea Macke	9148 Manderson Street	X	
Mark Macke	9148 Manderson Street	X	
Theresa Jones	9153 Manderson Street	X	
Julie Erhart	9225 Spaulding Ave.	X	
Tom Erhart	9225 Spaulding Ave.	X	
Paul Pennington	Assistant City Attorney, City of Omaha prosecutor	X	
J. Michael Tesar	Deputy City Attorney; City of Omaha prosecutor	X	
Alan Pepin	Defendant - resident of Anchorage, Alaska		X
Donald Carey	Defendant - resident of Melbourne, Florida		X
John Waldron	11230 Miami Circle		X
Janet Grant	6404 North 79 <sup>th</sup> Ave.		X
Peter Macke	9148 Manderson Street		X
Kaycee Jones	9153 Manderson Street		X
Marcus Jones	9153 Manderson Street		X
Anna Becker	9160 Manderson Street		X
David Becker	9160 Manderson Street		X
Joe Becker	9160 Manderson Street		X
David Smalheiser	Assistant City Attorney, City of Omaha prosecutor		X
Michael Goldberg	Assistant City Attorney, City of Omaha prosecutor		X
Michael Winchester	Assistant City Attorney, City of Omaha prosecutor		X
Thomas Harmon	Attorney, office at 6035 Binney Street		X
Thomas Warren	City of Omaha Police Chief		X
Officer Linda Rod	City of Omaha police officer		X
Officer Angela Echtenkamp	City of Omaha police officer		X
Officer Charles Myles	City of Omaha police officer		X
Officer Charles Ott	City of Omaha police officer		X
Officer David Adams	City of Omaha police officer		X
Officer David Preston	City of Omaha police officer		X
Officer Kevin Nelson	City of Omaha police officer		X

*the day*



WITNESS NAME	ADDRESS OR OTHER IDENTIFIER	WILL CALL	MAY CALL
Officer Keith Miskie	City of Omaha police officer		X
Officer Michele Santee	City of Omaha police officer		X
Officer Randall Mitchell	City of Omaha police officer		X
Officer Rosemary Burde	City of Omaha police officer		X
Officer Shayna Ray	City of Omaha police officer		X
Officer Theodore Wesack	City of Omaha police officer		X
Rudy Tesar (foundation only)	Clerk of the District Court of Douglas County		X
Teresa Smith-Sims (foundation only)	Douglas County Court Criminal/Traffic Division manager		X
Jane Alexander (foundation only)	Omaha Police Department Records Unit manager		X
Omaha Public Schools Personnel Department representative	Omaha, Nebraska		X

It is understood that, except upon a showing of good cause, no witness whose name and address does not appear herein shall be permitted to testify over objection for any purpose except impeachment. A witness appearing on any party's witness list may be called by any other party. "Impeachment purposes" shall mean only (1) to attack or support the credibility of a witness or (2) to attack or support the validity of or the weight to be given to the contents of a document or other thing used solely to attack or support the credibility of a witness. It does not include evidence which merely contradicts other evidence.

(E) EXPERT WITNESSES' QUALIFICATIONS.

(i) Experts to be called by plaintiff and their qualifications are:

None

(ii) Experts to be called by defendant and their qualifications are:

None

(F) DEPOSITIONS AND OTHER DISCOVERY DOCUMENTS.

(i) All depositions, answers to written interrogatories, and requests for admissions or portions thereof which are expected to be offered in evidence by the plaintiff as part of the plaintiff's case-in-chief are:

1. None

Objections by the defendant are: Not applicable

(ii) All depositions, answers to written interrogatories, and requests for admissions or portions thereof which are expected to be offered in evidence by the defendant as part of the defendant's case-in-chief are:

1. None

Objections by the plaintiff are: Not applicable

(G) VOIR DIRE. Counsel have reviewed Fed. R. Civ. P. 47(a) and NELR 47.1 and suggest the following with regard to the conduct of juror examination: Examination first by the Court, then supplemented by further inquiry by counsel.

(H) NUMBER OF JURORS. The parties suggest that this matter be tried to a jury composed of 12 members.

(I) VERDICT. The parties will not stipulate to a less than unanimous verdict.

(J) DELIVERY OF BRIEF, INSTRUCTIONS, AND/OR PROPOSED FINDINGS.

(i) Trial briefs shall be filed at least five (5) working days before the first day of trial.

(ii) Proposed jury instructions shall be filed at least five (5) working days before the first day of trial.

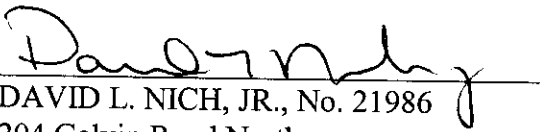
(iii) Exhibit notebook shall be delivered to the Trial Judge at least five (5) working days before the first day of trial.

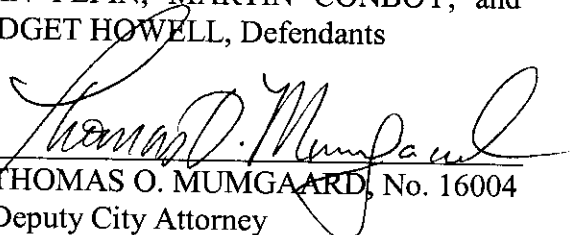
(K) LENGTH OF TRIAL. Counsel estimate the trial will consume not less than 2 day(s), not more than 3 day(s), and probably about 3 day(s).

(L) TRIAL DATE. Trial is ~~set for June 28-30, 2005.~~ *to be determined by the court.*  
*(M) by motion for summary judgment to be filed by June 30, 2005.*  
Accepted by the parties this 10th day of June, 2005.

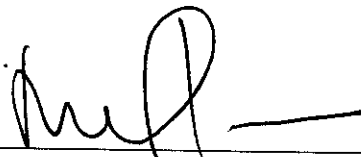
PAUL COSTANZO, Plaintiff,

CITY OF OMAHA, DONALD CAREY,  
ALAN PEPIN, MARTIN CONBOY, and  
BRIDGET HOWELL, Defendants

By   
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Approved by the Court this 10<sup>th</sup> day of June, 2005.

  
Thomas D. Thalken  
United States Magistrate Judge

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA**

PAUL COSTANZO,

Plaintiff,

vs.

CITY OF OMAHA, DONALD CAREY,  
ALAN PEPIN, MARTIN CONBOY, and  
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Defendants.

Case No. 8:04CV99

**LIST OF EXHIBITS**

Courtroom Deputy:

Court Reporter:

Trial Dates: June 28-30, 2005

Exhibit No.			Description	Offered	Objection	Rec'd	Not Rec'd	Date
Pl	Def	3Pty						
1			Income tax returns & pay stubs of Paul Costanzo		R, H, A, O (not disclosed)			obj under 2b FRAND sustained
2			Omaha World Herald articles concerning Paul Costanzo & Wanda Costanzo		R, H, A, O (not disclosed)			obj under 2b FRAND sustained
3			OPD Internal Affairs documents that are the subject of a motion to compel to be made at the pretrial hearing.		R, H, O (not disclosed)			Qual motion made, denied, no exhibits to be listed. P
4								
5								
	101		Omaha Police Department information card re procedure for obtaining a misdemeanor warrant (form 241)(front & back)			X		
	102		OPD Uniform Crime Report by L. Rod, RB#09161-U (2 pgs)			✓		
	103		OPD Uniform Crime Report by L. Rod, RB#17679-U (2 pgs)			✓		

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Exhibit No.			Description	Offered	Objection	Rec'd	Not Rec'd	Date
Pl	Def	3Pty						
	104		OPD Uniform Crime Report by D. Adams, RB#82155U (4 pgs)			✓		
	105		OPD Uniform Crime Report by C. Ott with Supplementary, RB#85465-U (4 pgs)			✓		
	106		OPD Uniform Crime Report by C. Ott with Information Report, RB#40126-A (4 pgs)			✓		
	107		OPD Information Report by T. Wesak, RB#79488-A (2 pgs.)			✓		
	109		OPD Information Report by D. Preston, RB#11851-U (2 pgs.)			✓		
	110		OPD Information Report by L. Rod with Supplementary, RB#09162-U (4 pgs.)			✓		
	111		OPD Information Report by R. Burdess, September 25, 2001 (2 pgs.)			✓		
	112		OPD Information Report by A. Echtenkamp, RB#26048 (2 pgs.)			✓		
	113		OPD Information Report by C. Myles, RB#11025-A (1 pgs.)			✓		
	114		OPD Information Report by M. Santee, RB#U85933			✓		
	115		Photocopy of photograph of Costanzo back yard with tree			✓		
	116		Selected court records in CR 01-30701 (Complaint; Harassment Protection Order; Prosecuting Attorney's Complainant Agreement; Affidavit of Complaining Witness; Arrest Warrant; Journal Entry re conviction).			✓		
	117		Selected court records in CR 03-9431 (Complaint; Affidavit of Complaining Witness; Arrest Warrant; Journal Entry re dismissal).			✓		

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